

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

<b>IN THE MATTER OF</b>	)	
<b>WALTER E. SULLIVAN,</b>	)	
<b>Appellant,</b>	)	<b>DOCKET NO. 99-07-186</b>
	)	
<b>v.</b>	)	
	)	
<b>DEPARTMENT OF HEALTH AND</b>	)	<b>DECISION AND ORDER</b>
<b>SOCIAL SERVICES,</b>	)	<b>GRANTING MOTION</b>
<b>Agency.</b>	)	<b>TO DISMISS</b>
	)	

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**BEFORE:** Robert Burns, Vice-Chairperson, Dallas Green, and John F. Schmutz, Esquire, Members, constituting a quorum of the Merit Employee Relations Board ("Board") as required by 29 Del. C. § 5908(a).

**APPEARANCES**

For the Appellant: Walter S. Sullivan, pro se  
2435 Grubb Road  
Wilmington, DE 19810

For the Agency: Ilona Kirshon, Deputy Attorney General  
Department of Justice  
Carvel State Office Building  
820 North French Street  
Wilmington, DE 19801

**NATURE OF THE PROCEEDINGS**

This is a grievance appeal to the Merit Employee Relations Board ("Board") pursuant to Merit Rule No. 21.0120 after a fourth step grievance decision adverse to the Appellant. The appeal was filed on July 28, 1999. The Agency filed a motion to dismiss the appeal on November 8, 1999 on the basis that the Board does not have the jurisdiction to hear the appeal under Merit Rule No.

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21.0121 because it was a grievance of a "needs improvement" performance evaluation which did not lead directly to a denial of a pay increase. The appellant filed a written response to the motion to dismiss contending that his claim was one of retaliation giving him a "needs improvement" evaluation having filed a prior grievance concerning the failure of the agency to adhere to Merit Rules related to classification, assignment, temporal standards, promotion and compensation in violation of Merit Rules 3.0800 and 3.0810.

The matter was scheduled for argument before the Board on the motion to dismiss on December 2, 1999. The Board has considered the written submission of the parties and considered the arguments presented. This is the decision and order of the Board granting the motion to dismiss for the reasons set forth hereinafter.

### **MERIT RULES AND STATUTORY PROVISIONS**

#### **29 Del. C. § 5931. Grievances.**

The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The Director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this Chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days.

#### **MERIT RULE 20.0420**

No action will be taken that will threaten, intimidate or retaliate against the employee for initiating or processing a grievance.

## **MERIT RULE 21.0121**

Any employee may request a written review of his/her performance appraisal by the Personnel Commission [Merit Employee Relations Board] following an unacceptable Step 3 decision if the employee's overall performance appraisal was unsatisfactory and has directly led to the denial of a pay increase. This written review will be limited to a consideration of whether the formal appraisal procedures were followed and whether there is any factual support for the performance appraisal. The Commission [Board] will uphold the evaluator's overall performance rating if it is supported by relevant facts. The Commission will not substitute its judgment for that of the evaluator. (Emphasis added)

### **FINDINGS AND DISCUSSION**

The resolution of the Agency's motion to dismiss in this case turns on the nature of the grievance which Mr. Sullivan has filed and what he seeks to bring before the Board through this appeal from an adverse decision of the designee of the Director of the State Personnel Office after the Fourth Step of the grievance hearing process. (See Merit Rule Chapter 20.)

The Agency contends that Mr. Sullivan is presently grieving a "needs improvement" performance rating and points to the relief which he sought in his initial grievance filing after receiving the performance rating. In that grievance the relief sought is the revision of his "needs improvement" rating to "exceeds expectations"; the rescission of the requirement that he meet with his supervisor each Friday to review his work and identify any obstacles to completing his work by due dates; and the removal of the requirement that he attend a time management class. The agency argues that the only performance appraisal which can be appealed to the Board is one which is "unsatisfactory" (rather than merely "needs improvement") and which has directly led to the denial of a pay increase. Merit Rule No. 21.0121. The Agency also points in contrast to the significantly different relief Mr. Sullivan seeks in his appeal filing before the Board which is: to be promoted to the position of Chief DACSES (Delaware Automated Child Support Enforcement Services) Administrator with paygrade

20; retroactive pay with interest from August 1991; and punitive damages. The Agency argues that this revised claim for relief relates to a prior grievance that Mr. Sullivan did not timely appeal to the Board concerning his allegation of violations of Merit Rule 3.0800 and 3.0810. The Agency contends that Mr. Sullivan can not now do indirectly through this subsequent grievance claim of retaliation what he did not do before in a timely manner, namely to bring the prior complaint before the Merit Employee Relations Board and argues that Mr. Sullivan's claim of retaliation for a "needs improvement" evaluation is nothing more than a "red herring". The Agency takes the position that the present grievance appeal is in reality an attempt to bring both a time barred grievance appeal of his classification dispute and a statutorily barred appeal of a performance evaluation which is not "unsatisfactory" and which did not result directly in a loss of a pay increase. (Merit Rule No. 21.0120)

Mr. Sullivan argues that his present grievance is based on the retaliatory action of his agency for his having announced his intentions to actively pursue what he perceives to be unjust treatment concerning the position of Chief DACSES Administrator and his grievance concerning that matter. Mr. Sullivan argues that the act of giving him a "needs improvement" rating is an overt act evidencing the Agency's desire to retaliate against him for pursuing the prior grievance. He asserts that the "needs improvement" rating was determined from considerations of work performance in non-critical work areas (lack of timeliness in filing reports and failure to meet other deadlines). He asserts that such action is improper; that it violates his reading of the State of Delaware Performance Review User Guide; and, is retaliatory.

Mr. Sullivan's claim of retaliation has been rejected at four prior steps in the grievance process and the Board finds that it is a thinly veiled attempt to re-litigate and have the Board review his prior

grievance concerning Merit Rule 3.0800 and 3.0810 and the proper classification of his position in state employment which Mr. Sullivan contends was wrongly and unjustly decided against him. Mr. Sullivan may be right about his prior grievance or he may be wrong, but in either event it is not a matter that this forum can address either directly or indirectly since there was no timely appeal after the 4th step decision on that grievance. *Maxwell v. Vetter*, Del. Supr., 311 A.2d 864 (1973). In short, the Board does not believe that Mr. Sullivan can now seek relief from this Board for his classification dispute with the Agency. The Merit System authorizes the Board to correct and compensate for the wrongs sustained by State employees in the course of their employment with the State of Delaware. *Department of Corrections v. Worsham*, Del. Supr., 638 A.2d 1104 (1994). However, the timely filing of an appeal is a prerequisite to the exercise of that jurisdiction. *Cunningham v. Department of Health And Social Services*, Del. Super., No. 95A-10-003 (March 27, 1996) (Order), Ridgely, Pres. J., 1996 WL 190757, affirmed, 679 A.2d 469 (Del. Supr. June 3, 1996) (rehearing denied June 13, 1996).

The Board also finds that Mr. Sullivan's present grievance, while couched in allegations of retaliation, is in fact a grievance of a "need improvement" performance rating and does not qualify as a grievable matter which can be appealed to the Merit Employee Relations Board. Such a "needs improvement" evaluation may be given wrongly or mistakenly, but unless it has directly led to the denial of a pay increase, under the Rules in effect at the time this grievance was filed, the grievance process for such an evaluation ends with the final decision of the head of the Agency. Merit Rule No. 20.0340.

It should be noted that if an Agency threatens, or takes a material adverse personnel action against an employee, or otherwise acts to intimidate an employee in the exercise of his or her rights

as a state employee, such matters are grievable and appropriately appealable. If such event were to occur, the employee would have the right, if he or she acts in a timely manner, to grieve and to attempt to show that there was no just cause for such action if it is disciplinary in nature, or to attempt to establish that such action was retaliatory and seek to establish a connection between such acts and protected conduct. In this case, however, the Agency action is a performance rating and under Merit Rule 20.0340 Mr. Sullivan may not appeal his January 1999 "needs improvement" performance evaluation to the Merit Employee Relations Board.

**CONCLUSIONS OF LAW**

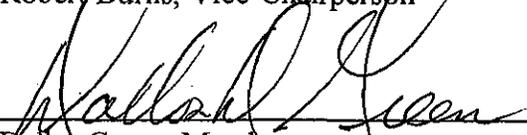
The motion to dismiss this grievance appeal should be granted for the reasons stated in the Agency motion to dismiss and those set forth above.

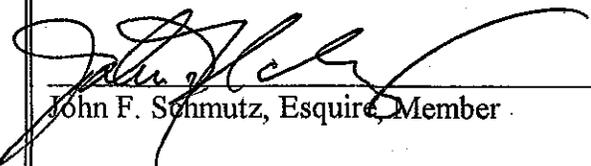
**ORDER**

For the foregoing reasons, the motion of the Agency to dismiss the appeal is granted. The appeal of Mr. Walter E. Sullivan is dismissed by unanimous vote of the undersigned members of the Merit Employee Relations Board.

SO ORDERED this 20<sup>th</sup> day of January, 2000.

  
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Robert Burns, Vice-Chairperson

  
\_\_\_\_\_  
Dallas Green, Member

  
\_\_\_\_\_  
John F. Schmutz, Esquire, Member

## APPEAL RIGHTS

29 Del. C. § 5949 (b) provides that the employee shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with the law. The burden of proof of any such appeal to the Superior Court is on the employee. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within thirty (30) days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: Jan. 20, 2000

Distribution:

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Agency's Representative

Merit Employee Relations Board

Robert Burns, Vice Chairperson

Dallas Green,

John F. Schmutz, Esquire